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FILMING THE POLICE AS AN ACT OF RESISTANCE REMARKS GIVEN AT THE “SMARTPHONED” SYMPOSIUM

BY JOCELYN SIMONSON¹

Good morning everyone and thank you so much for having me here today. The last few years have seen an unprecedented rise in the public nature of acts of civilian recording of police officers. Think, for example, of the videos of the choking of Eric Garner on Staten Island or the shooting of Walter Scott in North Carolina. Each of those videos quickly became a part of the national conversation around police violence, revealing to privileged audiences the racialized nature of everyday police violence. Although the function of civilian recordings of the police in the public sphere is an important one, today I am going to talk less about the importance of *videos* of police conduct, and more about the *act of filming* itself – the act of taking out a smartphone and pointing it at a police officer who is doing police work in public. I am going to argue that the act of filming *itself* is an act of expression, protected by the First Amendment, whether or not a video is ever viewed after it is taken.

Two weeks ago today, a federal district court in Philadelphia issued an opinion holding that there is no First Amendment right to film the police.² That decision, Fields, consolidated two Section 1983 cases together, in which plaintiffs sued the police department of the City of Philadelphia for violating their First Amendment rights by arresting them for filming the police in public. One plaintiff was a man who was walking down the street and decided to take out his cell phone and film police officers across the street outside of a party because it was “interesting,” and the other plaintiff was a

1. Assistant Professor, Brooklyn Law School. These remarks were given at the March 2016 symposium, “Smartphoned,” at the St. Thomas School of Law. They are based in large part on arguments that I have made in two related articles, *Copwatching*, 104 CAL. L. REV. 391 (2016), and *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L. J. (forthcoming 2016).

2. *Fields v. City of Philadelphia*, No. CV 14-4424, 2016 WL 2754014 (E.D. Pa. Feb. 19, 2016).

woman who was a legal observer at an anti-fracking protest. Judge Kearney of the District of Philadelphia consolidated the cases, and said in direct opposition to other federal courts who had heard similar issues before that there is not a First Amendment right to record. The court's words were: "[w]e find no basis to craft a new First Amendment right based solely on 'observing and recording' [the police in public] without expressive conduct."³ In other words, without additional expressive conduct – e.g., words or actions – filming the police is not on its own protected by the First Amendment.

There was a fair amount of surprise in reaction to this decision, in part because Circuit Courts who have addressed whether there is a right to record have, for the most part, found that such a right does exist.⁴ (Admittedly, though, the Third Circuit, which governs Philadelphia, has held that there is not a clearly established right to record in the Circuit – the standard in a 1983 suit.)⁵ But Judge Kearney did not say that there is not a clearly established right, he said there is no right. And many commentators have argued that the judge got it wrong.⁶ I agree, and most courts outside of the Third Circuit would agree. When commentators have said that this case got it wrong, they have done so using a particular argument. It is the same argument that the First Circuit and the Seventh Circuit and other federal appellate courts have used when they have held that there is a First Amendment right to record. That leading argument says that to take out a phone and make a film or photograph of the police is similar to gathering news or spending money on a political campaign, which makes filming protected conduct because it is ancillary to speech. Here, for example, are the words of the First Circuit: "gathering information about government officials in a form that can be readily disseminated to others serves a cardinal first amendment interest in protecting and promoting the free discussion of governmental affairs."⁷ This theory of why filming the police is protected activity holds that, just like gathering news or donating to a political cause, which are not speech in themselves, filming the police is so essential to preparing to engage in protected speech that it is protected by the First Amendment.

Surely that argument is correct, and the Fields court was wrong to reject it. But my concern with the leading cases and commentary, and especially my concern now as the Fields decision heads to the Third Circuit on appeal,

3. *Id.* at *1.

4. See *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); see also *Adkins v. Limtiaco*, 537 F. App'x 721, 722 (9th Cir. 2013) (per curiam) (First Amendment right to take photos of police).

5. See *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010).

6. See, e.g., Shahid Butler & Sophia Cope, *Court's Decision on Recording Police Erodes First Amendment Rights and Transparency While Inviting Violence*, available at <https://www.eff.org/deeplinks/2016/02/decision-eroding-first-amendments-rights-civil-rights-transparency-inviting-violence>.

7. *Glik*, 655 F.3d at 82 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

is that the leading cases skip over the possibility that filming the police can be a form of expression in itself, rather than just something that is preparatory to disseminating a recording at a later time.

So what I want to argue today is that filming itself is an act of expression. I begin by discussing a manner of recording the police that is hard to deny is a form of expression. I begin with organized copwatching. Organized copwatching occurs when groups of residents of a particular neighborhood go on patrols together to film police officers on duty, often wearing matching t-shirts, holding visible recording devices, and engaging in conversations with civilians and police officers alike as they film. Copwatching has a strong history among African-American communities; here is a picture of a Watts community patrol in 1966 in Los Angeles that went around with cars, using notepads rather than cameras to record police activity. And the Black Panthers famously engaged in organized copwatching by patrolling police officers on duty while holding guns. Since then, and especially in the last few years, copwatching groups have grown in both number and prominence around the United States. Here are some pictures of groups in St. Louis and Ferguson, that were founded in the summer of 2014, shortly after the birth of the #BlackLivesMatter movement. And then here is a picture of an organization here in Minneapolis, Communities United Against Police Brutality, which was founded in 2000. This Minneapolis group has been doing organizing against police brutality, not just here in the city, but throughout the state, and they also have organized copwatching patrols. The mission of Communities United Against Police Brutality is this: “our overriding goal is to create a climate of resistance to abusive authority by police organizations, and to empower local people with a structure that can take on police brutality and actually bring it to an end.” The reason I read you this mission statement is to make the point that copwatching organizations often made to me when I interviewed them for a study that I conducted. The point is that organized copwatchers have a purpose beyond the prevention of police misconduct in the moment and the preservation of videos for future dissemination; they also engage in copwatching as a form of power building and power shifting – as a form of resistance to police authority over their neighborhoods. In other words: a form of expression.⁸

I have here on this slide a picture of a man named Kevin Moore, who lives in Baltimore and was a friend of Freddie Gray. Mr. Moore is the individual who took out his camera and filmed Freddie Gray being arrested. Since that time, Mr. Moore has become an activist against police brutality in Baltimore and an activist in favor of using the tactic of copwatching to prevent police violence.⁹ In this picture here you can see that Mr. Moore is

8. For an extended discussion along these lines and the results of Professor Simonson’s study of copwatching groups, see generally Simonson, *Copwatching*, *supra* note 1.

9. For more on Kevin Moore, see <http://www.baltimoresun.com/news/maryland/bs-md->

wearing a “Copwatch” T-shirt, holding up a camera that is directed at us, the viewer of the photograph. The best way that I can describe his facial expression is that he appears determined. I would argue this act that we see here – pointing a video camera at us, if you imagine that we are police officers, is inherently expressive.

I am not sure that even the district court in Philadelphia would deny that if you had someone like Kevin Moore, wearing a copwatch t-shirt, standing in front of a police officer, part of a larger movement against police brutality, possibly questioning the officer verbally, those actions all together would constitute expressive conduct. That conduct is probably expression such that, unless it is interfering with something the police officers are doing or undermining public safety, will be protected by the First Amendment. But what the court in Philadelphia said is that just filming alone is not itself expression. So I want us to imagine that in this picture Kevin Moore is not wearing a copwatch t-shirt and that he has not spoken or used an expressive facial expression. Imagine that Mr. Moore is simply holding up a phone and pointing it at a police officer. My argument today is that because of the history of filming police officers in our country – both the history of patrols by African-Americans during the civil rights movement and the recent history of anti-police brutality actions involving cameras – you cannot hold up a camera in front of a police officer without it being a political act or an act of dissent, or at least invoking in our larger culture those political acts and acts of dissent.

There is some First Amendment precedent for this idea that observation can be a form of expression in itself, and that observation can also be a kind of dissent, especially in the relationship of police officers and the public. There is a robust jurisprudence in the Supreme Court surrounding the First Amendment right to observe courtroom proceedings. And that jurisprudence emphasizes not only the eventual dissemination of information gathered at those proceedings, but also the act of observing in the moment. The Court has said: “the value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed. The sure knowledge that anyone is free to attend gives assurance that established procedures are being followed, and that deviations will become known.”¹⁰ In other words, to observe public officials doing their work in public is itself a powerful gesture because it is holding public officials accountable *in the moment*, because just being observed on its own is a form of deterring misconduct. Relatedly, the Court said in 1987 in

[copwatch-20150627-story.html](https://www.copwatch-20150627-story.html); <https://news.vice.com/article/we-spoke-to-kevin-moore-the-man-who-filmed-freddie-grays-arrest>.

10. *Press-Enter. Co. v. Superior Court of California*, 464 U.S. 501, 508 (1984); *see also* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2197–2200 (2014) (discussing the First Amendment values behind the Supreme Court’s public trial cases).

Houston v. Hill, cursing at police officers is protected conduct because “the freedom of individuals verbally to oppose or challenge police actions without thereby risking arrest is one of the principle characteristics by which we distinguish a free nation from a police state.”¹¹ If you combine these two ideas – one, that observation is itself a form of expression and two, that our First Amendment protects the ability to contest police actions in the moment, then you can arrive at the conclusion that just to hold up a camera in front of a police officer is itself a form of expression.¹²

It matters whether we think about recording the police as preparatory to speech or as an act of expression itself. Here is one example of why the distinction matters. In 2015, a Texas legislator proposed a bill that would have criminalized the filming of police officers by non-media. The bill would have amended the criminal code to say that it is a crime to film, record, photograph, or document a police officer on duty within 25 feet of the officer.¹³ If the only purpose of the First Amendment were to protect the ability of civilians to capture footage of officers, then it might not be that troublesome to say, listen, if you’re going to film a police officer you have to stand 25 feet away. But if we recognize that to visibly hold up a recording device in front of a police officer is expression in the moment, then 25 feet might be too much. Identifying filming as an act of expression can make all the difference in the analysis of a law such as the proposed one in Texas. (Note that the argument I am making is just about the initial on/off switch of whether something is protected conduct under the First Amendment. If it is protected conduct, you would then have to determine which level of scrutiny to apply to a government action, and engage in the appropriate balancing.)

The Fields Court actually got the First Amendment right to record wrong in two different ways. The first error of Fields is that the Court disagreed with the First and Seventh circuits, and other courts that have found that filming the police in public is protected conduct because it is preparatory to speech. But the Fields court also made a second error, which is to miss the fact – and fail to even address the argument – that recording is an act of resistance in itself. You cannot divorce the act of taking out a camera and filming a police officer from the current situation that we are in today, in which filming police officers has become an important symbolic act and a crucial tool of opposing police brutality more broadly. I believe that Fields will remain an outlier, and that in two decades from now it will be clearly established in every jurisdiction in America that there is a First Amendment right to record the police. As the jurisprudence develops, my hope is that courts will begin to recognize the expressive dimension of the act of recording – a dimension

11. *City of Houston v. Hill*, 482 U.S. 451, 461 (1987).

12. For an extended argument along these lines, see Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L. J. (forthcoming 2016).

13. H.B. 2918, 84th Leg., Reg. Sess. (Tex. 2015).

crucial not just to understanding the act, but to protecting it under the Constitution as well.